U.S. Department of Labor

Office of Administrative Law Judges
Seven Parkway Center - Room 290
Pittsburgh, PA 15220

(412) 644-5754
(412) 644-5005 (FAX)

DATE: January 16, 2001

CASE NOS.: 2000-LHC-989
2000-LHC-990

In the Matter of:

JOE LANDY,
Claimant

v.

STEVEDORING SERVICES OF AMERICA;
CERES MARINE TERMINAL,
Employers

and

HOMEPORT INSURANCE COMPANY,
Carrier

APPEARANCES:

Gregory E. Camden, Esquire
For the Claimant

Robert A. Rappaport, Esquire
For Ceres Marine Terminal

John Barrett, Esquire
For Stevedoring Services of America

BEFORE: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This case arises from claims for compensation under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et. seq.*, hereinafter referred to as the "LHWCA" or the "Act" and the implementing regulations, 20 C.F.R. parts 710 and 702. The Act provides compensation to certain employees (or their survivors) engaged in maritime employment for occupational diseases or unintentional work-related injuries, irrespective of fault, occurring upon the navigable waterways of the United States or certain adjoining areas, resulting in disability or death. With limited exceptions, the Act provides the exclusive remedy for such injuries against maritime employers which have secured the payment of benefits.

PROCEDURAL HISTORY[1]

Claimant filed his claims on January 6, 2000. Claimant seeks temporary total disability benefits from July 30, 1999, through December 27, 1999, and temporary partial disability benefits from December 28, 1999, through July 23, 2000. Claimant seeks these benefits for an injury sustained on June 10, 1999. On January 28, 2000, the Director, Office of Workers' Compensation Programs (OWCP), referred this case to the Office of Administrative Law Judges (OALJ) for a hearing. The cases were assigned to me on July 17, 2000. I consolidated them for hearing and purposes of a decision and order.

A formal hearing was held before the undersigned on September 11, 2000, in Newport News, Virginia, at which the parties were given a full and fair opportunity to present evidence and argument. No appearance was entered for the Director, OWCP. Claimant's Exhibits (CX) 1-14, Ceres Marine Terminal's (Ceres) Exhibits 1-21, and Stevedoring Services of America's (SSA) Exhibit 1 were admitted in evidence. Ceres and Claimant submitted joint proposed findings of fact (JX-1). SSA and Claimant also submitted joint proposed findings of fact (JX-2). The record remained open post hearing for the submission of additional medical evidence and closing briefs.

I. STIPULATIONS

Claimant and Ceres stipulate and I find:

A. Claimant is covered by the Act which applies to this proceeding.

B. Claimant and Ceres were in an employee-employer relationship at the relevant times.

C. Claimant sustained an injury on June 10, 1999.

D. The injury occurred in the course and scope of Claimant's employment.

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[1] The following references will be used: "TR" for the official hearing transcript, "CX" for a claimant's exhibit, "CeresX" for a Ceres' exhibit, and "SSAX" for a SSA's exhibit.

E. Claimant provided timely notice of his injury to Ceres.

F. Claimant's claim for compensation was timely filed.

G. Ceres filed timely notice of Contraversion.

H. Claimant's average weekly wage at the time of the injury was $1,579.10, resulting in entitlement to compensation at a rate of $871.60.

I. Ceres paid Claimant compensation based on an average weekly wage of $459.47, resulting in a compensation rate of $306.31.

J. Ceres paid Claimant compensation as indicated on its August 13, 1999, LS-208 form.

K. Claimant has a wage earning capacity of $1,125.35 for 29 6/7 weeks from December 27, 1999 to July 23, 2000.

Claimant and SSA stipulate and I find:

A. Claimant is covered by the Act which applies to this proceeding.

B. Claimant and SSA were in an employee-employer relationship on March 1, 1998.

C. Claimant sustained an injury on March 1, 1998.

D. The injury occurred in the course and scope of Claimant's employment.

E. Claimant provided timely notice of his injury to SSA.

F. Claimant claim for compensation was timely filed.

G. SSA filed timely notice of conversion.

H. Claimant's average weekly wage at the time of the injury was $1,579.10, resulting in a compensation rate of $835.74.

I. Claimant was paid compensation as indicated on SSA's May 29, 1998 LS-208 form.

J. Claimant was released to full duty by his treating physician, Dr. Morales, on May 22, 1998.

II. ISSUE

Whether Claimant's current back condition is causally related to his work related injury of June 10, 1999, entitling him to temporary total disability from July 30, 1999, through December 27, 1999, and temporary partial disability from December 28, 1999, through July 23, 2000.

III. FINDINGS OF FACT

A. BACKGROUND

Claimant is currently fifty-one years old and is a resident of Chesapeake, Virginia. (TR 19). As a member of the International Longshoremen's Association for thirty-two years, Claimant has worked for numerous employers. (TR 19). Claimant has worked a variety of positions such as a header, general longshoreman, and hustler driver. (TR 22). As a header, Claimant assumed supervisor duties. (TR 20). He would lead a group of men called a gang. (TR 20). Claimant was responsible for giving his gang members work positions for the day, supervising their work, and making sure no one in his gang gets hurt while working. (TR 20). When Claimant worked as a longshoreman, he was required to move pallets from one place to another with a forklift. (TR 21). These pallets contain various kinds of beans and weigh around ninety to one hundred pounds. (TR 21). As a hustler driver, Claimant drove yard trucks around the waterfront lots.[2] (TR 22). He would set up the boxes for the ships. (TR 22).

On June 10, 1999, Claimant, while working as a hustler driver at Ceres' shipyard, injured his back. (TR 25-27). He was hooking up a hose to a trailer train when he noticed that one of the hoses was leaking.[3] (TR 24). He got out of the truck and unhooked the hose. (TR 24). Claimant realized that he had not cut the air off of the hose. As he was cutting the air off, he fell against the end of the trailer train, striking the middle of his lower back.[4] (TR 26). In order not to fall off of the truck, he held on to the area of the trailer train where the gas is filled, pinning his right leg beneath his body. (TR 26). Although Claimant experienced excruciating pain in his back and right leg, he finished out his shift. (TR 27-28). A couple of days after the injury, Claimant was evaluated and treated at Now Care. (CX6 pg. 1). Then Claimant saw Dr. Lawrence Morales, his family physician.[5] Id. Dr. Morales recommended a conservative course of treatment consisting of physical therapy and a follow-up

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[2] Yard trucks are small trucks that haul materials such as box frames.

[3] A trailer train is a big trailer that a container can be lowered onto from a train. It differs from a chassis because the end is too big to be latched or locked down.

[4] Counsel for Ceres argued that Claimant originally stated that he struck his back against the trailer after seeing a flash or spark but later changed his statement of injury to that he fell. Counsel acknowledged this discrepancy in Claimant's statement of injury because Dr. Williamson testified in his deposition that a herniated disk is caused by a trauma or fall. I disagree with counsel's argument that Claimant had changed his statement of injury. After reviewing the record, I find that Claimant had stated several times that he lost his balance, thus falling backwards striking his back against the trailer.

[5] I take judicial notice from the American Board of Medical Specialists that Dr. Morales is Board-certified in orthopaedic surgery.

examination. (CX6 pg. 2).

B. SSA BACK INJURY

Claimant sustained a back injury on March 1, 1998, when he twisted his back as he was unloading large rolls of paper while working as a longshoreman for SSA. (CeresX 13 pg. 1). He continued working his shift and due to increased stiffness in his back he visited the Sentara Norfolk General Hospital emergency room later that evening. Id. He complained of upper back pain and tingling in his fingertips. Id. He was diagnosed with an acute left trapezius strain and discharge that evening. Id. He was given a work excuse for two days and given a course of treatment consisting of using heat for twenty minutes at a time for muscle relaxation. Id. If his pain did not decrease in four to five days, Claimant was to visit an orthopedic doctor. Id.

In his report dated March 5, 1998, Dr. Lawrance Morales, Claimant's family physician, noted that Claimant complained of neck pain, left shoulder pain, numbness and tingling in his left arm and fingertips, numbness in his right hand, and low back pain with some pain radiating down into his lower legs. (CeresX 17 pgs., 9-11, CX 3 pgs. 1-3, CX 5 pgs. 1-2). X-rays of the cervical spine, lumbar spine, and of the shoulder were negative for a fracture or dislocation. (CeresX 17 pg. 10, CX 3 pg. 2). Dr. Morales injected trigger points with Methyl Prednisolene and Marcaine and ordered Claimant to return for a follow- up examination. (CeresX 17 pgs. 10-11, CX 3 pgs. 2-3, CX 5 pg. 2).

Claimant returned to Dr. Morales on March 11, 1998. (CeresX 17 pg. 8, CX 5 pg. 3). He continued to complain of neck and left shoulder pain and he still experienced spasm in his lower back. Id. Dr. Morales recommended an MRI of Claimant's neck and left shoulder. Id. He injected Claimant's left neck and shoulder with Methyl Prednisolene and Marcaine and ordered Claimant to return for a follow-up examination. Id.

An MRI was performed on Claimant on March 16, 1998. (CX 4 pgs. 1-5). The MRI of Claimant's cervical spine revealed the following: multi-level degenerative changes of the mid and lower cervical spine; mild to moderate central canal stenosis at C4/5 and C5/6 secondary to central posterior osteophyte formation/ossification of the posterior longitudinal ligament; mild central canal stenosis at C6/7 secondary to conventional degenerative disk disease and posterior osteophyte formation; mild neural foraminal narrowing noted throughout the cervical spine secondary to uncovertebral joint and facet osteophyte formation; and mild to moderate bilateral neural foraminal narrowing, left greater than right, at C6/7. The MRI also revealed a straightening and slight kyphotic anuglation of the mid cervical spine. (CX 4 pg.2).

The MRI of Claimant's left shoulder revealed a full thickness tear of the anterior aspect of the supraspinatus tendon likely secondary to moderately severe degenerative changes.[6] (CX 4 pg. 3). The MRI of Claimant's lumbar spine revealed large right broad disk protrusion or extrusion displacing the sac and right S1 nerve root at L5/S1, bilateral disk bulging and facet joint hypertrophy with relative foraminal narrowing at L4/5, and a mild bilateral disk bulging of L3/4. (CX 4 pg. 4).

Dr. Morales saw Claimant six more times between March 19, 1998, and April 24, 1998. (CeresX 17 pgs. 1-7, CX 5 pgs. 4-9). On March 19, 1998, Claimant saw Dr. Morales regarding continuing neck, shoulder, and low back pain. (CeresX 17 pg. 7, CX 5 pg. 4). Claimant further complained of continuing numbness in his lower extremities and upper left body. Id. Dr. Morales continued to treat Claimant symptomatically. Id. Claimant's pain continued so intensely that on March 24, 1998, he spent the day in bed. (CeresX 17 pgs. 5-6, CX 5 pg. 5-6). Dr. Morales ordered an electromyelograph (EMG) to determine a course of treatment. Id.

On March 30, 1998, Claimant underwent the EMG. (CeresX 16 pgs.1-3). The EMG exposed evidence of a probable mild compression of the left median nerve at the wrist and evidence of a probable mild compression of the C7 nerve root in the left. (Ceres X 16 pg. 3). The EMG further showed evidence of a probable L5 and/or S1 nerve root compression on the left. Id. Dr. Morales diagnosed Claimant as non-fit for duty and scheduled a follow-up appointment. (CeresX 17 pg. 4, CX 5 pg. 7).

On April 3, 1998, Dr. Morales noted that Claimant had a decreased range of motion of the cervical spine with evidence of spasm, even in his low back with positive straight leg raising. (CeresX 17 pg. 4, CX 5 pg. 8). Claimant further complained of shoulder pain. Id. On April 8, 1998, Claimant continued to complain of neck pain, however, his numbness and tingling were less frequent. (CeresX 17 pg. 2, CX 5 pg. 9). Dr. Morales further noted that Claimant still had decreased range of motion of the cervical spine but his spasm had symptomatically improved. Id. Dr. Morales recommended an epidermal instillation of cortisone. Id. The epidermal was performed on April 13, 1998. (CX 3 pg. 14).

Claimant returned to Dr. Morales on April 24, 1998, for a follow-up after his epidermal injection. (CeresX 17 pg. 1, CX 5 pg. 9). Although Claimant still experienced some soreness and achiness about his lower back, Dr. Morales noted that Claimant responded well to the epidermal injection. Id. Dr. Morales recommended physical therapy. Id.

In his independent medical examination report, dated April 28, 1998, Dr. Felix M. Kirven, Board-certified orthopaedic surgeon, concluded that Claimant suffered from lumbar stenosis and a rotator cuff tear in his left shoulder. (CX 1 pgs. 8-10). Dr. Kirven conducted a physical examination of Claimant, reviewed Claimant's March 30, 1998, EMG report, March 16, 1998, MRI of the cervical

[6] I note that Claimant did not submit the full MRI report of his left shoulder.

spine and left shoulder, and past medical history. Id. Dr. Kirven opined that Claimant is not a candidate for surgery. (CX 1 pg. 10). He recommended a course of treatment consisting of three weeks of water aquatics and a prompt return to his regular duties.[7] Id.

Dr. Morales released Claimant to work in May of 1998. (TR 23). However, Claimant did not return to work until October of 1998 due to an unrelated carpel tunnel syndrome injury.

Id. Claimant was returned to work with no restrictions and continued with his regular duties as a header, general longshoreman, and hustler driver. Id.

Dr. Kirven conducted a follow-up independent medical examination of Claimant on March 16, 1999. (CX 1 pg. 12). He noted that Claimant voiced no complaints, is not taking any specific pain medication, and is able to perform his duties without difficulty. Id. He dated Claimant's maximum medical improvement on this date. Id. Dr. Kirven further determined that Claimant had no focal abnormalities and no permanent or partial impairment. Id.

C. CERES BACK INJURY

On June 10, 1999, Claimant sustained an injury to his lower back when he lurched backwards to avoid what he thought were flames coming from an unhooked hose of a hustler. (CX 6 pg. 1). This caused Claimant to lose balance and pin his right leg beneath his body. Id. Claimant informed his employer regarding his injury but continued working over the next couple of days. Id. When Claimant started experiencing increased pain, he was treated at Now Care and then subsequently visited Dr. Morales on June 18, 1999. Id. He complained of pain in his right knee and pain from his back into both buttock. Id. Dr. Morales noted that there was bilateral paravertable muscle spasm and Claimant was positive for straight leg raising. Id. Dr. Morales injected Claimant's back with Methyl Prednisolene and Marcaine. (CX 6 pg. 2). Dr. Morales ordered Claimant to attend physical therapy followed up with an examination. Id.

Mr. Stephen F. Schall, physical therapist, recommended that Claimant attend physical therapy three to four times a week for the first two weeks. (CX 11 pgs. 1-3). In his report dated June 23, 1999, Mr. Schall stated that Claimant moved about the examination room very slowly and with difficulty. (CX 11 pg. 1). When standing, Claimant was slightly forward bent and displayed almost no side bending, backward bending, or forward bending. Id. Claimant experienced difficulty toe walking and heel walking. Id. Furthermore, Claimant was unable to squat because of knee pain. Id. Mr. Schall noted that Claimant's range of motion of the above tasks were inconsistent with what he displayed when performing tasks on the mat and getting out of the chair. (CX 11 pg. 2). Furthermore, Mr. Schall noted that pitting edema was evident in both legs and feet. Id. Mr. Schall tested Claimant's feet for sensation, however, this result was also inconsistent. Id. He diagnosed Claimant with possible diabetes. Id.

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[7] Dr. Kirven based Claimant's course of treatment without reviewing his lumbar spine MRI.

Claimant returned to Dr. Morales on June 25, 1999, for a follow-up. (CX 6 pg. 3). He continued to complain of pain in his back commensurate with bending and stooping. Id. Claimant was also experiencing spasm in his lower back and pain radiating to his leg. Id. Dr. Morales noted there was a decreased range of motion. Id. Dr. Morales once again injected Claimant with Methyl Prednisolone and Marcaine. He also ordered an EMG and recommended that Claimant see him again in a week. Id.

An EMG was performed on Claimant on July 2, 1999. (CeresX 10 pg. 1, CX 7 pg. 1). Dr. Anne Redding, Fellow American Association of Electrodiagnostic Medicine, found that Claimant's nerve conditions were normal and the needle examination showed positive waves and fibrillations in the gastrocs. Id. She concluded that the needle study was essentially the same as Claimant's December 24, 1997, study. Id. Dr. Redding found no new evidence of new neuropathy or radiculopathy.[8] Id.

Claimant continued to see Dr. Morales three more times in July of 1999. (CX 6 pgs. 4-6). On July 7, 1999, Claimant continued to complain of low back spasm. (CX 6 pg. 4). Dr. Morales injected Claimant with Marcaine and continued Claimant with his physical therapy. Id. On July 12, 1999, Claimant complained of pain in his back and hip and weakness in the right lower extremity. (CX 6 pg. 5). On July 23, 1999, Dr. Morales ordered Claimant to undergo an MRI. (CX 6 pg. 6).

Claimant underwent an independent medical examination performed by Dr. John A. Williamson, Board-certified orthopaedic surgeon, on July 27, 1999. Dr. Williamson conducted a physical examination of Claimant, reviewed his June 18, 1999, x-rays, reviewed his July 2, 1999, EMG results, and considered his past medical history. He noted in his July 27, 1999, letter that Claimant complained of pain across his lower back, right side greater than left, radiating to both legs, going from his groin and then to his feet, all his toes on his right foot and the big toe on his left foot. (CX 9 pgs. 1-2). Dr. Williamson noted that Claimant displayed a "somewhat unusual gait pattern" in his presence, however, Claimant appeared to have no problems dressing or undressing himself and retrieving his cane when he dropped it on the floor.[9] Dr. Williamson diagnosed Claimant with a back strain. (CX 9 pg. 2). He recommended a CT scan and for Claimant to cease receiving the trigger point injections. Id.

On August 5, 1999, Claimant underwent an independent medical evaluation performed by Dr. Steven L. Gershon, Board-certified physiatrist. (CeresX 5 pgs. 1-5, CX 8 pgs. 1-2). Dr. Gershon conducted a physical examination of Claimant, reviewed his July 27, 1999, MRI, reviewed both his EMG results, and considered his past medical history. Id. The MRI revealed a large right paracentral disk protrusion at L5/S1 impinging on the nerve root at S1. (CeresX 5 pg. 2). Dr. Gershon, after reviewing the waveform analysis of the July 2, 1999, EMG, concluded that the recording electrodes were improperly placed. Furthermore, he concluded that the sural sensory response was of poor quality. Dr. Gershon did note that the first study was performed on the left side and the follow-up study

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[8] Neuropathy or new radiculopathy indicates pressure on the nerve. (CeresX 1 pg. 15).

[9] Dr. Williamson did not personally witness Claimant retrieving his cane from the floor. Dr. Williamson heard Claimant drop his cane but when he entered the room the cane was no longer on the floor. (CeresX 1 pg. 6).

was performed on the right side of Claimant's body. Id. Dr. Gershon diagnosed Claimant with a lumbosacral sprain. (CeresX 5 pg. 4). He further pointed out that although Claimant does have some pathology in his lower extremities, he is demonstrating a high degree of symptom magnification behavior. Id. Dr. Gershon did not believe that Claimant's condition was related to his injury at Ceres. Id.

On August 9, 1999, Claimant returned to Dr. Morales complaining of continued pain in his back, radiating into his right buttock and leg. (CX 6 pgs. 7-8). He opined that Claimant may require surgery based upon his symptoms, physical findings, and his positive MRI results of July 27, 1999. (CX 6 pgs. 7). He continued to treat Claimant symptomatically. Id.

Claimant concluded physical therapy on August 11, 1999. (CeresX 12). In an addendum to his August 5, 1999 evaluation, dated August 19, 1999, Dr. Gershon clarified that Claimant's lumbosacral sprain had resolved. (CeresX 6). Furthermore, Dr. Gershon opined that Claimant's current symptoms from his sensory motor peripheral polyneuropathy are not secondary to his lumbar sprain and are not constantly related to his June 10, 1999 injury at Ceres.[10] Id.

Dr. Williamson reviewed Claimant's July 27, 1999, MRI on August 23, 1999. (CeresX 3, CX 9 pg. 3). He concluded that Claimant had a large ruptured disk at L5/S1 which would produce weakness at the gastroc, decreased sensation in the little toe, and a lack of ankle reflexes. Dr. Williamson further opined that taken all together, Claimant's complaints of bilateral leg pain, bilateral foot pain, numbness of toes, and medial thigh numbness and tingling along with decreased sensation in both feet and a normal motor exam are not fully consistent with the MRI findings. Id. Dr. Williamson further determined that since Claimant's EMG was normal, there should not be any significant pressure on the right nerve root at S1. He diagnosed Claimant with degenerative disk disease with desiccation at L4/5 and L5/S1, on setting probably longer than two months ago. He was unable to determine the specific date in time Claimant ruptured his disk. Id.

Dr. Williamson reviewed Dr. Gershon's evaluation of August 5, 1999, and his addendum report of August 19, 1999. (CeresX 4, CX 9 pg. 4). He agreed with Dr. Gershon that Claimant's pathology was a lumbosacral sprain and that it had resolved. Id. He further agreed that Claimant's current neuropathic symptoms are unrelated to his lumbar sprain, therefore, unrelated to his June 10, 1999, work injury. Id.

Dr. Morales subsequently reviewed Dr. Gershon's August 5, 1999, medical report on October 20, 1999. (CX 6 pgs. 15-16). He disagreed with Dr. Gershon's diagnosis of a lumbosacral strain. (CX 6 pg. 15). Dr. Morales opined that Claimant's major problem is a herniated disk, which was revealed in his July 27, 1999, MRI.

Dr. Morales saw Claimant approximately ten times between September 1999, through May

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[10] Peripheral polyneuropathy involves both peripheral nerves in the lower extremities. (CeresX 1 pg. 18). It is a disease process in the nervous system which can display symptoms of numbness and tingling in the feet. Id.

2000. (CX 6 pg. 12, CX 6 pg. 14, CX 6 pgs. 15-16, CX 6 pgs. 18-20, CX 6 pgs. 22-28). He continued with a conservative course of treatment, treating Claimant symptomatically with physical therapy, trigger point injections, and an epidermal injection. (CX 6 pg. 12, CX 6 pg. 14, CX6 pgs. 18-20). Claimant's back condition improved in December 1999. (CX 6 pg. 22). Dr. Morales released Claimant to full duty on December 27, 1999. (CX 6 pg. 21). In January of 2000, because of Claimant's continued pain, Dr. Morales recommended that Claimant only perform the duties of a header. (CX 6 pg. 23). Although he complained of pain and discomfort around the low back and radiating into the hips, Claimant continued to work as a header and a checker. (CX 6 pgs. 26-27, CX 6 pg. 29). Because of the condition of his back, Claimant cannot do repetitive bending or stooping, heavy lifting, or perform the duties of a hustler driver. (CX 6 pgs. 27).

In a letter to SSA's counsel dated May 8, 2000, Dr. Kirven concluded that Claimant's June 10, 1999, work accident was a new injury resulting in his herniated disk. (CX 1 pg. 13). Dr. Kirven reached his conclusion by reviewing Claimant's April 16, 1998, MRI scan, July 27, 1999, MRI scan, and July 27, 1999, CT scan. Id. Dr. Kirven reasoned that Claimant was first injured on March 1, 1998, and then injured a second time on June 10, 1999. The July 27, 1999, MRI scan revealed a change from the April 16, 1998, MRI scan; ergo, indicating a new injury as of June 10, 1999, resulting in the herniated disk. Id. Dr. Morales subsequently reviewed this report and agreed, to a reasonable degree of medical certainty, with Dr. Kirven's conclusion. (CX 6 pgs. 32-33).

Approximately one and one-half months later, on June 26, 2000, Dr. Kirven changed his diagnosis of Claimant. (CeresX 9 pgs 1-8, CX 1 pgs 1-8). After reviewing Claimant's medical records, Dr. Kirven opined with a reasonable degree of medical certainty that Claimant's MRI findings are unrelated to his March 1, 1998, injury and his June 10, 1999, injury. (CeresX 9 pg. 7). In a post-hearing letter dated October 3, 2000, Dr. Kirven opined not only that Claimant's MRI findings are unrelated to his two previous work injuries, but also that the herniated disk pre-dated his June 10, 1999, work injury. (CeresX 22). Furthermore, Dr. Kirven stated that there was no clinical correlation with the MRI findings. Id. Dr. Kirven failed to explain, or even mention, his prior diagnosis of May 8, 2000.

In his July 19, 2000, deposition, Dr. Williamson concluded, with a reasonable degree of medical certainty, that Claimant's ruptured disk is not consistent with his June 10, 1999, work related accident. (CeresX 1 pg. 24). Dr. Williamson explained that within medical probability it is thought that ruptured disks are not a direct blow injury. (CeresX 1 pg. 26). He stated that in classic probabilities, ruptured disks can be axioloading and actually compressing the disks and rupturing them that way.[11] Id. Ruptured disks are also consistent with torsional injuries. Id. Furthermore, Dr. Williamson opined that Claimant's presentation of his physical condition does not match his pathology seen on his MRI scan. (CeresX 1 pg. 14). Dr. Williamson was unable to diagnose what was causing Claimant's physical symptoms. (CeresX 1 pg. 13).

Dr. Williamson further explained in his deposition that it is impossible to date the origin of

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[11] Axioloading is when a person falls from heights and lands on his buttock.

Claimant's injury based upon a single MRI scan because it is just a static picture. (CeresX 1 pg. 12). Dr. Williamson further explained that the way to approximate the origin date of an injury with an MRI scan is to take two MRI scans and compare the results. Id. If the injury was present on the second scan, but not the first, then the injury appeared sometime after the first scan. Id. However, it is not possible to pinpoint the date of the origin of an injury. Id. Dr. Williamson further testified that he would defer to Dr. Gershon's expert opinion regarding the quality of Claimant's July 2, 1999, EMG results. (CeresX 1 pg. 18).

By July of 2000, Claimant was unable to do any job that required him to do heavy lifting. (CX 6 pg. 31). As of September of 2000, Claimant continued with a conservative course of treatment by Dr. Morales. (TR 33). Because of his current back condition, Claimant is unable to do the jobs of a general longshoreman or a hustler driver. (TR 32-33). However, because Claimant is an "A" card holder he is given top seniority and his earnings are actually greater than they were since July 23, 2000. (TR 37)[12].

IV. CONCLUSIONS OF LAW

A. INJURY AND DISABILITY

Section 2(2) of the LHWCA defines an "injury" as an accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arising naturally out of such employment or as naturally or unavoidably results from such accidental injury. 33 U.S.C. § 902(2); *see U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor*, 455 U.S. 608, 102 S. Ct. 1312 (1982), *rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980). Section 20(a) of the Act provides a presumption that a claim comes within its provisions once a claimant has made a prima facie case. 33 U.S.C. § 920(a).

The presumption is invoked by a prima facie claim for compensation. A prima facie claim for compensation is created when the claimant establishes that (1) he or she sustained a physical harm and (2) an accident occurred in the course of employment or conditions existed at work which could have caused the harm or pain. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). Once the presumption is invoked, the party opposing entitlement must present specific and comprehensive medical evidence proving the absence of or severing the causal connection between such harm and employment or working conditions. *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 305 (1989); *Conoco, Inc. v. Director, OWCP*, 33 BRBS 187 (CRT)(5th Cir. 1999); *Parsons Corp. of Cal. v. Director,*

[12] It was stipulated at trial that Claimant's earnings are greater than they were since July 23, 2000. It was further stipulated that there is no claim before the undersigned beyond July 23, 2000. (TR 37).

OWCP, 619 F.2d 38 (9th Cir. 1980). [13]

If the Administrative Law Judge finds the presumption is rebutted, it no longer controls and he must weigh all of the evidence and resolve the causation issue based upon the record as a whole. *Devine v. Atlantic Container Lines, G.T.E.*, 25 BRBS 15 (1991). When the evidence as a whole is considered, it is the proponent (claimant) who has the burden of proof. *See, Director, OWCP v. Greenwhich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed. 2d. 221, (28 BRBS 43(CRT)(1994)).

In the instant case, Claimant alleges that he sustained an injury to his lower back as a result of a work related accident on June 10, 1999. The medical evidence of record demonstrates that Claimant suffers from a herniated disk located in his lower back with resulting pain and discomfort. Claimant's credible and uncontradicted testimony indicates that he was involved in a work-related accident in the scope of his employment as a hustler driver for Ceres. This accident could have caused or contributed to Claimant's lower back problems.

Claimant has met the requirements for invoking the Section 20(a) presumption by advancing a prima facie claim for compensation. The burden has now shifted to Ceres to show that Claimant's condition was not caused or aggravated by his employment for Ceres. Ceres presented unequivocal evidence from Drs. Gershon and Williamson that no relationship exists between Claimant's herniated disk and work-related accident.[14] Therefore, the Section 20(a) presumption has been rebutted and the undersigned must consider the record as a whole in determining whether to award Claimant compensation.

It is necessary to consider the record as a whole to determine whether Claimant's low back condition was caused by his June 10, 1999, work-related injury at Ceres. At the hearing, both counsel for Claimant and counsel for Ceres agreed that SSA was not the employer responsible for Claimant's current disability.[15] The uncontradicted medical evidence clearly proves that Claimant returned to regular duty without restrictions following his March 1, 1998, injury at SSA. Therefore, I find that SSA is not responsible for any benefits to Claimant under the Act and is dismissed from this action.

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[13] In *Conoco*, the Fifth Circuit held a standard requiring an employer to "rule out" the possibility of a causal relationship between a workplace injury and the claimant's employment was too high a standard to place on employer to rebut the 920(a) presumption. In *American Grain Trimmers, Inc. v. Director, OWCP (Janich)*, 33 BRBS 71 (CRT)(7th Cir. 1999), cert. den._U.S. _(S.Ct. No. 99-696, Feb. 28, 2000), the Seventh Circuit iterated the employer's burden is one of "production" only.

[14] Although Dr. Kirven found that there was no causal relationship between Claimant's low back pain and his work-related accident at Ceres, his opinion is not unequivocal. I will discuss Dr. Kirven's findings later in the decision.

[15] Counsel for Claimant stated that SSA was originally named in the claim "out of an abundance of caution" that the undersigned might find that Claimant's low back condition was due to the original SSA injury and that SSA would not be present to defend such a claim. (TR 17). Counsel for Ceres indicated that it is not Ceres' position that the original SSA injury caused Claimant's current low back condition. (TR 14).

Unlike Drs. Kirven, Morales, and Williamson, Dr. Gershon is not Board-certified in orthopaedic surgery. Rather, Dr. Gershon is Board-certified in physiatrics.[16] Claimant's condition is orthopaedic in nature. Therefore, I accord more weight to the doctors who are Board-certified in orthopaedic surgery.

Despite Dr. Kirven's impressive qualifications as a Board-certified orthopaedic surgeon, I find his medical reports untrustworthy and based upon unsound scientific reasoning. Dr. Kirven initially examined Claimant in connection with his March 1, 1998, back injury at SSA. On March 16, 1999, Dr. Kirven determined that Claimant had reached maximum medical improvement and was capable of returning to his full work duties. On May 8, 2000, subsequent to Claimant's injury at Ceres, Dr. Kirven reviewed both of Claimant's MRI scans and opined that a new injury occurred on June 10, 1999, resulting in Claimant's herniated disk. Then on June 26, 2000, when Dr. Kirven was retained as an independent medical examiner for Ceres, he determined through a review of Claimant's medical records that Claimant's herniated disk is unrelated to his June 10, 1999, injury. He furthered this new opinion in a post-hearing letter dated October 3, 2000.

There are two inconsistent medical opinions from the same physician. Counsel for Ceres argued that Dr. Kirven's change of opinion was based upon his review of "all" of the medical records. However, Dr. Kirven never explained the factors or circumstances surrounding his change of opinion. Nor did Dr. Kirven explain why one opinion is more credible than the other. It appears to the undersigned that Dr. Kirven found that the June 10, 1999, injury at Ceres caused Claimant's herniated disk when he was retained as an independent medical examiner for SSA. It further appears to the undersigned that Dr. Kirven changed his opinion regarding Claimant's June 10, 1999, injury when he was retained as an independent medical examiner for Ceres.

Dr. Kirven opined in his October 3, 2000, report that Claimant's herniated disk pre-dated his June 10, 1999, injury at Ceres. Dr. Williamson testified in his deposition that it is not possible to pinpoint the date of origin of an injury from an MRI scan. Thus, Dr. Kirven has no scientific evidence to base his conclusion. Furthermore, Dr. Kirven examined Claimant just three months prior to his injury. He found no disabilities and found Claimant fit for full duty. Dr. Kirven's conclusion that Claimant's herniated disk pre-dated his June 10, 1999, injury is, at best, a guess. For the reasons stated above, I find that Dr. Kirven's medical opinion that Claimant's condition is not related to his June 10, 1999, work accident not credible.

As previously stated, both Dr. Morales and Dr. Williamson are Board-certified in orthopaedic surgery. Dr. Williamson opined that Claimant had a back strain which had resolved and Claimant was able to return to work without restrictions. He further opined that Claimant has a ruptured disk, however, the ruptured disk is not causing his symptoms and Claimant's low back condition was not

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[16] Physiatry is the branch of medicine which deals with the diagnosis, treatment, and prevention of disease or injury, and the rehabilitation from resultant impairments and disabilities, using physical agents such as light, heat, cold, water, electricity, therapeutic exercise, and mechanical apparatus, and sometimes pharmaceutical agents. It is physical medicine. *Dorland's Illustrated Medical Dictionary*, 1290 (28th ed. 1994).

caused by his June 10, 1999, work-related injury. Dr. Morales opined that Claimant's June 10, 1999, work-related injury was the cause of his herniated lumbar disk.

Dr. Williamson testified in his deposition that ruptured disks are inconsistent with a direct blow injury. He further testified that a ruptured disk on the right side of the body hitting the S1 nerve would cause pressure going down the right leg, into the lateral aspect of the foot, giving a weakness of the calf muscles, and losing reflexes. He relied on Claimant's July 2, 1999, EMG results and Claimant's lack of foot pain in reaching his conclusion. Dr. Williamson also determined that Claimant was demonstrating symptom magnification.

I found Claimant's testimony at the hearing highly credible and his pain legitimate. Claimant did not contradict himself during his testimony. Furthermore, his account of events and sentiments of pain and discomfort have been consistent throughout all his physical examinations.

On cross-examination, Dr. Williamson conceded that Claimant's herniated lumbar disk could have been caused by the June 10, 1999, work accident. He also admitted a torsional injury is consistent with a ruptured disk. Dr. Williamson deferred to Dr. Gershon's conclusion that the EMG's recording electrodes were improperly placed and the sensory response was of poor quality. There is substantial evidence in the record regarding Claimant's weakness in his leg and foot.[17] His reliance on the faulty EMG results and his finding of Claimant's lack of foot pain are inconsistent with the evidence of record.

Counsel for Ceres argues that Dr. Morales medical opinion should be found not credible based upon the fact that he attended medical school in Switzerland and because a federal court had previously questioned his credibility.[18] United States District Court Judge Robert Doumar held in an unrelated case that the testimony and credibility of Dr. Morales were contrary to the evidence and lacked the credibility compared to the weight of the other evidence. With all due respect to Judge Doumar, I attach no weight to his finding because it is irrelevant to this case. Furthermore, I find it irrelevant that Dr. Morales earned his medical degree outside the United States. He has met the stringent requirements of Board-certification.

Dr. Morales has treated Claimant for over a two year period. Within this time, Dr. Morales treated Claimant as frequently as three times a month. Dr. Morales ordered a conservative course of treatment throughout his treatment of Claimant. He began treating Claimant in 1998 with his first back injury, and thus he is intimately familiar with Claimant's medical history. In the instant case, I find credible the medical opinion of Dr. Morales regarding the nature of Claimant's condition.

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[17] See CX6 pgs. 3-9, and 26.

[18] Counsel is referring to United States District Court Judge Robert Doumar's findings in *In the Matter of the Complaint of the F/V CAPT. WOOL, INC., as Owner of the F/V Capt. Wool, Inc. for Exoneration from or Limitation of Liability*, 914 F. Supp. 1300 (E.D. Va. 1995).

I accord Dr. Williamson's opinion regarding Claimant's low back condition being unrelated to his June 10, 1999, injury at Ceres less weight than Dr. Morales' opinion. The judge is not bound to accept the opinion or theory of any particular medical examiner. The judge may rely upon his/her personal observation and judgment to resolve the conflicts in the medical evidence. A judge is not bound to accept the opinion of a physician if rational inferences cause a contrary conclusion. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir 1962); *Ennis v. O'Hearne*, 223 F. 2d 755 (4th Cir. 1955). No doctor diagnosed a herniated disk from Claimant's March 1998 MRI scan. Claimant was released to full duty without work restrictions in October 1998. Claimant was examined in March of 1999. He voiced no complaints, he was able to perform his regular work duties without difficulty, and he was determined to have no permanent or partial impairment.[19] This diagnosis was consistent with Claimant's diagnosis from his personal physician. Claimant was involved in a work-related accident at Ceres in June 1999. Immediately after this accident, Claimant complained of low back pain radiating to his buttock and down his legs. A July 1999, MRI revealed a herniated lumbar disk. Although it is impossible to pinpoint the exact date the herniated disk appeared, the only precipitating event in the record between the two MRI scans is the June 10, 1999, work injury at Ceres. A rational inference is that the June 10, 1999, work-related injury at Ceres caused Claimant's current low back condition. Accordingly, Claimant has established that his low back condition is causally related to his June 10, 1999, work injury.

Section 2(10) of the LHWCA defines "disability" as the incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. 33 U.S.C. § 920(10). In order for a claimant to receive disability benefits, he must have an economic loss coupled with a physical or psychological impairment. *Sproull v. Stevedoring Services of America*, 25 BRBS 100, 110 (1991); *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Owens v. Traynor*, 274 F. Supp. 770 (D. Md. 1967), *aff'd*, 396 F.2d 783 (4th Cir. 1975), *cert. denied*, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. *American Mutual Insurance Company of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in only type of gainful employment for which he is qualified. *Id.* at 1266.

Counsel for Ceres stated in his post-hearing brief that there is no issue as to the nature or extent of disability.[20] The evidence of record establishes that Claimant has a temporary total and temporary partial disability due to low back pain causally related to his work-related injury at Ceres. According,

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[19] The trier of fact can base one finding on a physician's opinion and, then, on another issue, find contrary to the same physician's opinion on that issue. *Pimpinella v. Universal Maritime Services, Inc.*, 27 BRBS 154 (1993). Although I accord no weight to Dr. Kirven's medical opinion regarding Claimant's condition in relation to his June 10, 1999, injury, I credit his medical report regarding his diagnosis of Claimant's full recovery from his March 1, 1998, injury.

[20] Ceres contended that there was no causal relationship between Claimant's low back condition and his June 10, 1999, work-related injury. However, if the undersigned found causation against Ceres, Ceres and Claimant had agreed to disability, dates, and compensation amounts.

Claimant is entitled to temporary total disability from July 30, 1999, until December 27, 1999, and, temporary partial disability from December 28, 1999, until July 23, 2000.[21]

B. COMPENSATION

Section 8(b) provides that in the case of temporary total disability, the employee is compensated with 66 2/3 percent of the average weekly wage during the period of disability. Therefore, Claimant is entitled to 66 2/3 percent of $1,579.10 from the period of July 30, 1999, through December 27, 1999.

Under Section 8(e), in cases of temporary partial disability, the compensation rate is 66 2/3 percent of the difference between the employee's average weekly wage before the injury and his wage-earning capacity after the injury, in the same or another employment, for the continuance of such disability, but in no case exceeding five years. Therefore, Claimant is entitled to 66 2/3 percent of the difference between $1,579.10 and $1,125.35 for a 29 6/7 week period between December 28, 1999, and July 23, 2000.

Claimant is currently earning more money as of July 24, 2000. Therefore, Claimant's disability compensation is cut off at July 23, 2000.

V. CONCLUSIONS

I find that Claimant's current low back condition is causally related to his June 10, 1999, work-related injury. The responsible employer is Ceres. Claimant is entitled to temporary total disability from July 30, 1999, until December 27, 1999, at 66 2/3 percent of the average weekly wage of $1,579.00. Claimant is entitled to temporary partial disability between December 28, 1999, until July 23, 2000, at 66 2/3 percent of the difference between the average weekly wage of $1,579.00 and the wage earning capacity of $1,125.35.

VI. ATTORNEY'S FEES AND COSTS[22]

Thirty (30) days is hereby allowed to Claimant's counsel for the submission of such an application. See, 20 C.F.R. § 702.132. A service sheet showing that service has been made upon all parties, including Claimant, must accompany the application. Parties have fifteen (15) days following receipt of any such application within to file any objections.

ORDER

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[21] Claimant and Ceres stipulated to the closed dates of disability. (JX 1).

[22] *See* 20 C.F.R. § 702.132.

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

1. Ceres shall pay to Claimant compensation for his temporary total disability from July 30, 1999, through December 27, 1999, based upon an average weekly wage of $1,579.00, such compensation to be computed in accordance with section 8(b) of the Act.

2. Ceres shall pay to Claimant compensation for his temporary partial disability from December 28, 1999, through July 23, 2000, based upon the difference between an average weekly wage of $1,579.00 and a wage earning capacity of $1,125.35, such compensation to be computed in accordance with section 8(e) of the Act.

3. SAA is Dismissed from this action with Prejudice.

4. All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

RICHARD A. MORGAN
Administrative Law Judge

RAM:ES:dmr
Pittsburgh, PA

APPEAL RIGHTS: Appeals may be taken to the Benefits Review Board, U.S. Department of Labor, Washington, D.C. 20210, by filing a notice of appeal with the district director for the compensation district in which the decision or order appealed was filed, within thirty (30) days of the filing of the decision or order, and by submitting to the Board a petition for review, in accordance with the provisions of part 802 of 20 C.F.R.